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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DESIREE MICHELLE HINTON, Defendant and Appellant.	A151035 (Solano County Super. Ct. No. FCR320079)

Defendant Desiree Michelle Hinton appeals a judgment entered upon a jury verdict finding her guilty of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))[1] and finding true a gun use enhancement (§ 12022.5). She contends that (1) the trial court erred in refusing to instruct the jury on a defense of unconsciousness and (2) the matter should be remanded to allow the trial court to exercise its discretion on whether to strike the firearm enhancement. We agree that defendant was entitled to an instruction on unconsciousness and that she was prejudiced by its omission. We therefore reverse her conviction. We also agree that, if she is again convicted and the firearm enhancement is found true, the trial court should consider whether to exercise its discretion to strike the enhancement.

[1] All statutory references are to the Penal Code.

I. BACKGROUND

A. Prosecution Case

Defendant lived in an apartment complex with her two daughters, D.H. and S.H., and her son J. (whose last name does not appear in the record). D.H. and S.H. were 12 and 11 years old respectively at the time of trial in January 2017, and J. was six years old.

On March 6, 2016, defendant went with the children to an amusement park. On the way home, she made stops at a few stores. She bought vodka from a liquor store, and she sat drinking it, mixed with cranberry juice, when they got home. She continued to drink throughout the night, consuming two or three drinks.

While the children were sitting on a couch in the living room, defendant took out a gun and banged it on the walls. Defendant told the children to stay downstairs rather than going upstairs to their rooms to sleep, and told the girls to keep their legs crossed. They had to ask to use the bathroom or to get up to throw something away. Defendant listened to music and danced, with the gun in her hand. S.H. testified this made her sad, because "I felt like she's not that person," and that defendant was acting differently than she ever had before.

Defendant's neighbor, Paul Winkler, saw defendant outside the apartment, holding a pistol and appearing "very frustrated." He asked her if the gun was loaded, and she said that it was. He told her to be careful and returned to his apartment. He heard defendant singing and banging the walls throughout the night. Winkler testified that defendant was usually kind, calm, and quiet.

In the apartment, defendant told D.H. to stand up and pointed the gun to D.H.'s head briefly once or twice, with the gun touching the middle of D.H.'s forehead. Defendant told D.H., "I brought you into this world, and I can end it." As the children sat on the couch, defendant grabbed a pillow, put it on D.H.'s face, and pressed it down on the side of her head for three or four minutes. D.H. could breathe "a little." D.H. was afraid defendant would hurt one of the children; she testified this behavior was "not like [defendant]."

Howard Smith was delivering newspapers at the apartment complex the following morning, March 7. Defendant came out of her apartment with a gun in her hands and pointed it at Smith's head, saying "[Y]ou get back right now and get out of here or I'm going to kill you." He was frightened and got back in his truck and left. A neighbor saw the incident and called 911.

Officer Daniel Healy of the Suisun City Police Department responded to the dispatch call. He saw defendant arguing with a man. Defendant told him the man was following her. Another police vehicle came into the apartment complex, and Healy told defendant she had to go talk with the officers in the vehicle. She refused and ran toward her apartment, as Healy chased her. Inside the apartment, defendant faced Healy and pointed the gun at his chest. He put his hand on the gun and tackled her, and they fell onto the couch. She said to him, "[Y]ou're dead mother fucker, I'm going to kill you, mother fucker, you're dead." He heard a clicking noise and saw defendant's finger pushing against the trigger, but the gun did not go off. They struggled over the gun as the other officers came into the room. The officers disarmed and subdued defendant. She continued to struggle, and they bound her ankles, so she could not kick her feet. During the struggle, defendant yelled over and over for her deceased brother, Quartus.

When one of the officers examined the gun defendant had used, he saw two bullets jammed inside the barrel.

B. The Children's Testimony on Cross-Examination

On cross-examination, D.H. testified that defendant began drinking more heavily and smoking two or three years previously, after the death of defendant's brother Quartus, and that before Quartus's death, defendant would not have pointed a gun at D.H.

D.H. and S.H. testified that they had seen J.'s father, Lothario Jones, hitting defendant. On one occasion, at defendant's workplace, Jones yelled at defendant that he wanted to see his son, then punched defendant on the head and neck. D.H. ran to defendant to try to hug her in order to prevent Jones from hitting defendant, but Jones continued to hit her.

D.H. and S.H. also testified on cross-examination that defendant was behaving strangely on the day they visited the amusement park. At the amusement park, defendant saw a man emptying trash cans; she thought he was following them and asked him to stop staring and following them. At a 7-Eleven they visited on the way home, defendant gave S.H. and J. straws, but said D.H. was not "ready" for a straw. She said the children could use the straws to keep people away, and that God would keep them away. Defendant had the children walk in a single-file line behind her. During the night, as D.H. slept on the couch, defendant became upset with her because she had not kept her legs crossed. Defendant had become angrier in the previous few days; D.H. had seen her being angry at strangers.

C. Defense Case

The theory of the defense was that defendant did not form the mental state necessary to commit the crimes.

1. Witnesses to Defendant's Behavior

Defendant owned and worked at a barbershop. A customer testified that, in December 2015, a man walked into the barbershop and had a tense conversation with defendant. They went outside the shop, and the customer heard defendant's daughter screaming. He went out of the shop and saw the man physically assaulting defendant as she crouched, trying to protect her head with her hands. Defendant's daughter was trying to protect her, but the man was still "landing shots." Police officers arrived.

In early January 2016, defendant contacted the District Attorney's office to see whether a warrant would be issued for Jones's arrest. She made clear that she wanted him prosecuted. At the time of trial, the District Attorney's office was prosecuting Jones for the assault on defendant.

One of defendant's brothers testified that defendant had a close relationship with Quartus and that his death was particularly hard on her. He also testified that after the December 2015 incident in which Jones "savagely beat her like a man," defendant appeared very fearful and did not want to go to work. She would mumble under her breath and say things to him that made no sense. She acted "out of character" both at

work and at family functions. She bought a gun for the first time after the beating. He spoke with her on the telephone before she was arrested on March 7, and she seemed incoherent, and did not seem to know she was talking to him. When she realized who he was, she hung up on him.

Another brother similarly testified that defendant had been a happy person all her life, but after Jones assaulted her, her behavior changed, and she was consistently fearful. He spoke with defendant the evening before she was arrested, and she sounded fearful and suspicious of him.

A friend and a worker at defendant's apartment complex also testified to recent changes in defendant's behavior. The friend testified that defendant was loving, optimistic, and dependable. Defendant's behavior changed after Jones beat her at the barbershop. She would say that she thought people in the barbershop had been sent by Jones, and she accused the friend of being involved with suspicious people selling phones near the barbershop. The maintenance supervisor at the apartment complex testified that his interactions with defendant had all been friendly. A week or so before March 7, she began to behave strangely. On the morning of March 7, she called the maintenance supervisor to her door. She seemed agitated, and she accused him of watching her. She was holding a glass with red liquid in it.

2. Expert Witnesses

Dr. Howard Friedman, a neuropsychologist who evaluated defendant, testified as an expert on her behalf. He reviewed police reports and reports by psychologists and other doctors, and he interviewed defendant twice in August 2016. His evaluation indicated defendant had "major problems in her capacity to think logically." Defendant's symptoms were consistent with posttraumatic stress disorder, with disorganized thinking. She had experienced delusions with a paranoid theme, she believed other people were "out to get her," and she was suspicious of different people's behavior.

Dr. Friedman opined that defendant was experiencing a psychotic disorder at the time of the events in question. The records he reviewed indicated that defendant's behavior had become increasingly erratic in the preceding week: defendant was losing

the ability to "pull herself together," and she was becoming more and more paranoid, delusional, and disorganized in her behavior. Her behavior was consistent with a brief psychotic disorder. In such a case, the brain could be "short-circuited" for a brief time and memories were not stored accurately in the brain. When Dr. Friedman interviewed defendant, she showed a spotty recollection of the March 7 incident. She did not recall putting a gun to her daughter's head or having an altercation with the police.

Dr. Linda Barnard, a marriage family therapist who testified as an expert in intimate partner battering and trauma, also evaluated defendant. Based on the information she received and her interview with defendant, Dr. Barnard testified defendant's relationship with Jones had been "particularly brutal and violent." The incident in which Jones beat defendant at her barbershop took place in public, in front of defendant's daughter, in broad daylight; for him to beat her in those circumstances, in what had been a safe place, was "extremely distressing" and "absolutely destroying to her."

Dr. Barnard testified that trauma can affect a person's ability to perceive a threat appropriately. The "trauma response just keeps firing over and over," so that everything could feel like a threat. Based on her assessment, Dr. Barnard concluded defendant had a heightened sense of danger between December 2015 and March 2016. She was not sleeping well or thinking right, and she was not acting normally, instead engaging in "a lot of random behaviors" as part of her response to the trauma of the beating. She did not recall many of the events in the week before the March 7 incident. Dr. Barnard thought defendant was psychotic at the time of the incident; she could no longer process information, behave normally, make reasonable decisions, or understand the consequences of her actions.

Dr. Barnard also testified that defendant described feelings that appeared dissociative. Dr. Barnard described dissociation as follows: "Dissociation is another mechanism that our brain has to split us off from our feelings, and so we dissociate from things by—and this is not a conscious process. Our brain does this to split us off from things that would be so overwhelming that we wouldn't be able to survive or to work

effectively." As an example, a person who described a horrible event without showing any feeling might be having a dissociative episode. She went on, "But the other problem with dissociation is that while a person is associated [*sic*], they're not laying down memory tracks, things are remembered sort of haphazardly. It's kind of like if you had a strobe light, you see certain things and then it's dark, and then you see something and it's dark, and you can't always put the whole together because you don't have all the pieces and . . . that's what happens with dissociation." Someone in a dissociative state as a result of violence or trauma may describe "feeling split off like it was happening to someone else or like they were sleepwalking so that they're not connected to the experience."

Dr. Barnard testified that Defendant described feelings consistent with this state between the December assault and the March 7 incident: she described feeling split off from herself, feeling like she was underwater, and feeling that she could not process things correctly. Additionally, she did not have logical or linear memories of the week or ten days before the March 7 incident, and she had no memory of struggling with the police officer over the gun. Dr. Barnard opined that defendant was experiencing the effects of intimate partner battering, that she had posttraumatic stress disorder, and that she was in a dissociative state as a result of Jones's assault on her.

D. Procedural History

Defendant was charged with attempted murder of a peace officer (§§ 187, subd. (a) & 664, subd. (e); count 1), assault upon D.H. with a semiautomatic firearm (§ 245, subd. (b); count 2), criminal threats (§ 422; counts 3 & 6), child abuse (§ 273a, subd. (a); counts 4 & 7), and assault on Howard Smith with a semiautomatic firearm (§ 245, subd. (b); count 5).

Defendant pled both not guilty and not guilty by reason of insanity. The jury found defendant guilty of count 2, assault on D.H. with a semiautomatic firearm (§ 245, subd. (b)), and found true an enhancement allegation that she personally used a firearm in the commission of the offense (§ 12022.5). The jury was unable to reach a verdict on the remaining counts. Pursuant to a negotiated disposition, defendant withdrew her insanity

plea and the prosecutor dismissed the remaining counts. The trial court imposed the lower term of three years for count two, with an additional three years for the firearm enhancement.

II. DISCUSSION

A. Unconsciousness

At trial, defendant asked the trial court to instruct the jury with CALCRIM No. 3425 on the defense of unconsciousness. Although the court initially indicated it was inclined to give the instruction, it ultimately declined to do so on the ground there was no evidence defendant was unconscious. Defendant contends this ruling was erroneous.

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.] To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417.)

A trial court must instruct on an affirmative defense, including unconsciousness, if the defendant relies on the defense and there is substantial evidence to support it, that is, evidence that a reasonable jury could find persuasive. (*People v. Rogers* (2006) 39 Cal.4th 826, 887; *People v. James* (2015) 238 Cal.App.4th 794, 804 (*James*); *People v. Williams* (2015) 61 Cal.4th 1244, 1263.) There is no duty to instruct on theories that lack substantial evidentiary support. (*People v. Burney* (2009) 47 Cal.4th 203, 246.) We do not weigh the credibility of the defense evidence, but only determine "whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . .'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.) The defendant has a right to have the jury determine every material issue presented by the evidence, and doubts about the sufficiency of the evidence to support an instruction should be resolved in favor of the defendant. (*People v. Wilson* (1967) 66 Cal.2d 749, 763–764.)

While the evidence of unconsciousness is not overwhelming or uncontradicted, we conclude it is sufficient to warrant an instruction so that a jury will determine whether the evidence proves beyond a reasonable doubt that defendant was conscious of her actions.

The defense of unconsciousness may be based on an unsound mind, even where the evidence might also support a defense of insanity. (*James*, *supra*, 238 Cal.App.4th at pp. 807-809.) Factors that have been found to support the defense include bizarre behavior, lack of coherence, and lack of memory of the events. For instance, in *James*, our division held a defendant charged with mayhem and assault was entitled to an instruction on unconsciousness; there was "ample evidence" he was unaware of his actions, based on reports he was trying to climb the exterior of a building, he was running around a parking lot crashing his head into cars and garbage cans, he was unresponsive to law enforcement commands, and he was mumbling incoherently. (*Id*. at pp. 798, 809–810.) Although there was also evidence the defendant had some awareness of his actions, our division concluded it was the role of the *jury* to weigh the evidence and determine whether the defendant was unconscious. (*Id*. at p. 810.)

The court in *People v. Gana* (2015) 236 Cal.App.4th 598 (*Gana*) similarly concluded the defendant was entitled to an instruction on unconsciousness. The defendant testified in her trial for murder and attempted murder that she recalled only holding a gun and hearing a shot. (*Id.* at pp. 601, 609.) Although her lack of recollection alone would not justify the instruction, there was also evidence that her eyes were wide open and her face lacked emotion as she shot her husband. and that after the shooting, she had a " 'thousand mile stare' " and looked "possessed," she did not respond to paramedics' questions, and the paramedics assessed her as having " 'an altered state of consciousness.' " (*Id*. at pp. 602–603, 609.) There was also expert evidence that the medications she was taking for cancer caused her to have worsening depression and psychoses. (*Id*. at p. 610.) This evidence, the appellate court ruled, supported instructions on unconsciousness. (*Ibid*.) Other courts have found unconsciousness instructions required where there was expert evidence the defendant was in a "schizophrenic fugue state" and acted based on " 'an automatic reaction without consideration,' " as " 'in a dream without any thought' " (*People v. Moore* (1970) 5 Cal.App.3d 486, 489–490, 492), and where there was evidence the defendant was

unconscious of the incident due to "a fugue (or dissociative) state" brought on from combat-induced neurosis (*People v. Lisnow* (1978) 88 Cal.App.3d Supp. 21, 23).

Under these precedents, the evidence here warrants an instruction on unconsciousness. There is evidence that, until Jones beat her at her workplace, defendant had been a happy person all her life. After that event, she became fearful and suspicious, and there was testimony that she would mumble under her breath, say things that made no sense, and act out of character. She behaved bizarrely on the two days at issue in this case: On the day she took the children to the amusement park, she thought a stranger was following her family, she told the children they could use straws to keep people away, she had them sit with their legs crossed for extended periods, and both of her daughters testified defendant was not acting like herself. The next day, she was incoherent when she spoke with her brother on the telephone, and she did not seem to know who he was. Although the expert witnesses did not testify explicitly that defendant was unconscious, there was expert testimony she suffered post-traumatic stress disorder and paranoid delusions, that she was experiencing a psychotic disorder in which the brain could be "short-circuited," with memories stored inaccurately, and that she had a spotty recollection of the events. And Dr. Barnard testified that defendant was in a dissociative state, a state Dr. Barnard described as like seeing with "a strobe light, you see certain things and then it's dark . . . and you can't always put the whole together." She testified defendant described feeling "split off from her self, like feeling she was under water, like she wasn't able to process things right."[2] Based on this evidence, the jury could have found defendant was unconscious when she assaulted her daughter. Defendant had a right to have the jury decide this issue, and the trial court erred in refusing the instruction.

[2] The Attorney General contends the testimony that defendant felt split off from herself as if she was under water and unable to process things constituted inadmissible case-specific hearsay. (*People v. Sanchez* (2016) 63 Cal.4th 665.) However, the prosecutor did not object to this line of questioning until after Dr. Barnard had testified that defendant described these feelings to her. Any objection to the admission of these statements is forfeited. (*People v. Abel* (2012) 53 Cal.4th 891, 924.)

This error requires reversal. Our high court has not determined whether erroneous refusal to instruct a jury on an affirmative defense is federal constitutional error or state law error. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 199.) But even assuming the more lenient state standard applies (*People v. Watson* (1956) 46 Cal.2d 818, 836), the omission is prejudicial. The defense was based on the theory that defendant did not form the necessary mental state, not that she did not carry out the acts of which she was accused. During deliberations, the jury asked two questions related to defendant's mental state. In response to the first, "Do we find her guilty or not guilty [b]efore we consider mental state?" the court told the jury that each crime had a defined mental state, either specific intent or general intent, and that if that mental state was absent, defendant did not commit the crime. The jury then asked, "[T]he definition of mental state? [W]ould that include psychosis?" The court provided a written response: "A psychosis or psychotic state may be considered in determining mental state. I refer you to instruction 3428. The mental states for each crime are outlined in that instruction." CALCRIM No. 3428 informed the jury: "You have heard evidence that the defendant may have suffered from a mental defect or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime." The instruction went on to tell the jury the People had the burden of proving that defendant acted with the required intent or mental state, specifically, for count 1 (attempted murder) that she had the intent to kill, for counts 3 and 6 (criminal threats) that she intended her statements to be taken as a threat, and in Counts 4 and 7 (child abuse) that she acted with criminal negligence. Notably, it made no reference to the only charge on which the jury convicted defendant, count 2, assault with a semiautomatic firearm, which is a general intent crime. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 218; *People v. Rocha* (1971) 3 Cal.3d 893, 897–900; see also *People v. Thiel* (2016) 5 Cal.App.5th 1201, 1209, italics omitted ["evidence of mental illness may be offered to show the absence of specific intent but not to prove the absence of general intent"].)

The Attorney General suggests that any error in omitting the instruction on unconsciousness was harmless because the jury was instructed that to find defendant guilty of assault with a firearm, it must find she acted willfully and was aware of facts that would lead a reasonable person to realize her act would result in the application of force to someone. Thus, according to the Attorney General, the jury implicitly found defendant was conscious of her actions. This argument would be more persuasive if the jury had not expressed uncertainty about how it could consider defendant's mental state and been directed exclusively to an instruction that indicated her mental state was relevant only the counts *other than* assault with a firearm. And, as we have explained, the jury was unable to reach a verdict on the other charges. In light of the jury's confusion and the apparent closeness of the case, there is a reasonable probability defendant would have achieved a more favorable result if the jury had been instructed that unconsciousness was a defense to all charges.

B. Firearm Enhancement

The jury found true an enhancement that defendant personally used a firearm in the commission of the offense, and the trial court imposed an additional three years for the enhancement. (§ 12022.5.) At the time, section 12022.5 provided for a mandatory additional term of 3, 4, or 10 years. (§ 12022.5, subds. (a) & (c).)

Subsequently, the Legislature enacted Senate Bill 620. (Sen. Bill No. 620 (2017–2018 Reg. Sess.) [effective January 1, 2018].) The bill amended section 12022.5 to give trial courts discretion to strike or dismiss enhancements otherwise required to be imposed by that statute. (§ 12022.5, subd. (c), as amended by Stats. 2017, ch. 682, § 1.) Defendant contends this provision should be applied retroactively and that she is entitled to ask the trial court to exercise its discretion to strike the firearm use enhancement. The Attorney General properly concedes this point. The amendments to section 12022.5 apply retroactively to cases not yet final on appeal, and the sentencing record does not show how the court would have exercised its new discretion to strike the enhancement. (See *People v. Vela* (2018) 21 Cal.App.5th 1099, 1113–1114; see also *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507 [SB 620's amendment to analogous

provision in § 12022.53 held retroactive]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–428 [same].)

In the event defendant is convicted on retrial and the firearm enhancement is again found true, the trial court shall consider whether to exercise its discretion to strike the firearm enhancement.

III. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

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Tucher, J.

We concur:

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Pollak, P.J.

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Streeter, J.